***United States Court of Appeals***

***for the Second Circuit***


# PETITIONER'S REPLY BRIEF

74-1001

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-1001, 74-1211

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Petitioner,*

—and—

PENSION FUND OF NEW YORK CITY TRUCKING INDUSTRY LOCAL 807,

*Intervenor,*

—v.—

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## REPLY BRIEF FOR PETITIONER AND INTERVENOR


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## REPLY BRIEF FOR PETITIONER AND INTERVENOR

The precedents cited by the Board in support of its contentions that Article III, Section 2(a) of the Pension Fund's Rules and Regulations is, *per se,* unlawful are inapplicable to the facts in this case.

Section 2(a) is not discriminatory and there is no record evidence to support any other conclusion. Union records have been used as a factor in making service credit deter-

minations, the permissibility of which is not disputed by the Board (A. 198). Furthermore, the Board found that the Pension Fund was administered without discrimination (A. 186).

The Trustees, effective October 1, 1971, amended the Pension Fund's benefit schedule by offering a monthly incentive increment to all covered employees for each year of credited service above thirty. Pension applicants claiming service credits for the pre-1937 period presented an administrative problem for the Trustees since there is a complete absence of Social Security records for that period. If Social Security records were available, for the pre-1937 period, Section 2(a) would not have been adopted by the Trustees and all past service determinations would have been made in accordance with rules and practices of the Pension Fund that are unchallenged by the Board.

The Board erroneously argues (Br. 4, 15) that the Trustees failed to adopt a provision to handle the difficulties that non-union employees would encounter in proving covered employment. The Board's corollary argument is that Section 2(a) accords a preference (Br. 12) to union members. Both arguments are unsupported by the record. Section 2(a) was adopted, interpreted and administered to afford all employees a reasonable opportunity to receive full past service credit. Section 2(a) mandates that pre-1937 credits be granted where employer records for that period are available. If employer records are not available the Trustees use Petitioner records as a factor in determining eligibility and "may," at their sole discretion, award credits for the pre-1937 period that the applicant was a Petitioner member.

Unlike *Nu-Car Carriers, Inc.*[1] Section 2(a) does not prescribe any presumption of covered employment by virtue of proof of union membership (A. 167). It deals with an administrative problem of the Pension Fund involving a distant period and effecting an ever decreasing small minority of covered employees.[2] Better drafting of Section 2(a) may have removed any ambiguity and confirmed the Trustees' practice of nondiscrimination. However, poor draftsmanship is not an unfair labor practice.

The Board's contention (Br. 5, 11) that it was the Pension Fund's practice not to accept employer records of covered employment, unless corroborated, is in direct conflict with the record evidence. The testimony of the Pension Fund's Assistant Administrator, Jack Zito (Br. 5), has been taken out of context. The collection of evidentary factors supporting a pension application is performed by the Pension Fund's administrative staff. They obtain Social Security information, employer records, Petitioner records and the future service records maintained in the Pension Fund's office (A. 44-47).

The administrative staff's function terminates following the receipt of this information and the preparation of an analysis sheet based upon it (A. 45). The applicant's full file is then turned over to the Trustees for their sole determination (A. 45). In fact, Robert Howard, August Vukek, Anthony Mazza, Carmen LaRocca, Peter Tracey, John Klepacki, John Zelenka, Walter May and Peter Thorp have

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[1] 88 N.L.R.B. 75; enf. *sub nom.* 189 F.2d 756 (C.A. 3, 1971); cert. denied 342 U.S. 919.

[2] 32 pensioners out of approximately 2,400 who are receiving a Fund benefit are affected by Section 2(a).

received pre-1937 pension credits based solely upon employer records (A. 142-145; 175).

Assuming, *arguendo,* that one would construe Section 2(a) to give a discriminatory advantage to Petitioner members, a review of the Supreme Court's decisions demonstrates, contrary to the Board's argument, that General Counsel had the burden of proving Petitioner's unlawful motive. General Counsel has not sustained that burden.

In *Radio Officers Union* v. *N.L.R.B.,* 347 U.S. 17 (1954) the Supreme Court identified motive as an essential element of proof for the Board to find a violation of 8(b)(1) or 8(b)(2) of the National Labor Relations Act.[3] However, the corollary holding was that unlawful motivation can be supplied by inference.

Justice Reed stated for the Court's majority, that both an intent to secure, and an effect of, encouraging union membership are essential to a finding of unfair labor practice. However, either motive or effect can be inferred without affirmative evidence where the "natural and foreseeable consequence" of the discriminatory act will be to increase the desire to achieve union membership.

Justice Frankfurter concurred in the Court's opinion but would require the Board to hear and consider evidence offered to rebut an inference of unlawful motive. He stated:

> "In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence, which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered

[3] 29 U.S.C. 151 *et seq.*

> or rebutted by other evidence which may be adduced, and which the Board must take into consideration."[4]

Justice Frankfurter's view of the Board's function was to weigh everything before it, including those inferences which can fairly be drawn from the record evidence. On the basis of the record, the Board must determine whether the alleged discrimination was such that the respondent in the Board proceeding should have reasonably anticipated that that discrimination would encourage or discourage union membership.

In *Local 357* v. *N.L.R.B.*, 365 U.S. 667 (1961) the Supreme Court limited the scope of its *Radio Officers* decision regarding the Board's power to infer an unlawful motive. While the Court did not overrule the *Radio Officers* decision, the Court made it clear that the Board's power to infer motive and effect was not unlimited.

Justice Harlan in his concurring opinion in *Local 357* found that the Board must require something more than a mere showing of foreseeable encouragement of union membership to make out an unfair labor practice and stated that:

> "a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the Act protects."[5]

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[4] 347 U.S. at 56.

[5] 365 U.S. at 679.

Where "encouragement" is shown, Justice Harlan was of the opinion that the General Counsel had the burden of affirmatively showing illegal motivation. He recognized some limited exceptions where the Board could infer illegal motivation, but only where the record shows no "significant" and "legitimate" justification for the action claimed to be illegally motivated.[6] This test was subsequently adopted by the Supreme Court in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965).

In *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) Justice White, writing for the Court, pointed out that under the *Radio Officers* criteria, intent can be proven by either direct evidence or inference. If direct evidence is available, "business justifications," become irrelevant. Where the element of motivation is sustained only by inference, business justifications became a key issue.

If the respondent in the Board proceeding failed to justify its actions, an unfair labor practice was established. If, on the other hand, respondent counters by explaining that its actions were taken in pursuit of legitimate business ends, and that its dominant purpose was not to discriminate or to invade Section 7 rights, its conduct requires further analysis. The Court in *Erie Resistor* explicitly accepted Justice Harlan's thesis that business justifications can rebut an inference of intent where actual motive to encourage or discourage union membership was not otherwise established.

The subsequent decisions of the Supreme Court in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278 (1965); *N.L.R.B.* v. *Great*

[6] 365 U.S. at 680-681.

*Dane Trailers, Inc.*, 388 U.S. 26 (1967) and *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) further defined the issue of motive in an unfair labor practice proceeding.

In the *American Ship Building* and *Brown* cases, no violation would be found in the absence of direct evidence of unlawful motivation.[7] The *Great Dane* and *Fleetwood* cases established a different test than the Court's earlier *American Ship–Brown* holdings. Under *American Ship* and *Brown* the failure of General Counsel to introduce affirmative proof of motive, in cases of slight restraint to Section 7 rights, precluded the Board from finding unlawful discriminatory conduct. The *Great Dane-Fleetwood* decisions permits the Board to find an unlawful motive (based upon an inference), in cases of slight restraint of Section 7 rights, unless the respondent comes forward with legitimate and substantial justification for its conduct.

The Board has improperly cited each of the foregoing cases. It failed to consider the Court's development of new guidelines regarding the evidentary element of motive in discrimination cases. Petitioner and Intervenor contend that the current status of that development rests with the *American Ship-Brown* and *Great Dane-Fleetwood* tests. Confrontation between these two tests seems inevitable, however, under either test the Board's Order in this case must be set aside.

The Board has cited *Melville Confections, Inc.* v. *N.L.R.B.*, 327 F.2d 689 (C.A. 7, 1964) and *Bendix-Westing-*

[7] Petitioner and Intervenor believe that the *American-Brown* test is appropriate to the facts in this case. Petitioner made a showing of legitimate and substantial justifications for its actions in the Board proceeding. The Board does not dispute this showing of justification (Br. 14).

*house Automotive Air Brake Company* v. *N.L.R.B.*, 443 F.2d 106 (C.A. 6, 1971) in support of its *per se* argument. However, in *Melville* and *Bendix* the respondent in the Board proceeding offered no evidence of legitimate and substantial business justification to rebut a provision in the employee benefit plan disqualifying union represented employees from eligibility to participate. In this case, however, the Petitioner introduced evidence of legitimate and substantial justification and, furthermore, the Board found that there was no discrimination in the administration of this provision (A. 184-186).

In *Bendix* the Sixth Circuit held that the General Counsel had made out, only, a *prima facie* case by introducing the questioned provisions into evidence and rejected the Board's theory of a *per se* violation. The Court found a *per quod* violation. Board Chairman Miller also rejects a *per se* approach to this type of case. He would have held that although such provisions are presumptively violative of the Act their actual impact must be determined in the context of each case.[8]

Similar language, as that contained in the *Melville* and *Bendix* cases, was also found in employee benefit plans of Goodyear Tire & Rubber Co. and its subsidiary Motor Wheel Corp. Unfair labor practice charges were also filed against both Goodyear and Motor Wheel.

In the *Goodyear* case[9] the Trial Examiner concluded that the language violated Section 8(a)(1) and 8(a)(3) of the

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[8] *Bendix-Westinghouse Automotive Air Brake Company*, 185 N.L.R.B. No. 29 n. 1.

[9] *Goodyear Tire and Rubber Co.*, 170 N.L.R.B. No. 79, 413 F.2d 158 (C.A. 6, 1969).

Act. He refused to receive evidence from Goodyear rebutting the inference that the language was discriminatory and concluded that the challenged language was so inherently discriminatory that it amounted to a *per se* violation. Evidence of business justification was found to be irrelevant.

The Board, without articulating any reason for its action, rejected the conclusion of a 8(a)(3) violation and found that the language violated Section 8(a)(1). The Board Order directed Goodyear to delete the language from its plans. The Sixth Circuit found "that the language in question was never intended to be used as a wedge against unionization" and that the record evidence did not show "that this language tended to inhibit" employees in the exercise of their Section 7 rights. Accordingly, the Court refused to enforce the Board's Order directing Goodyear to delete the disputed language from its plans.

In the *Motor Wheel* case,[10] the respondent sought a trial on the unfair labor practice charges in order to present rebuttal evidence. The Board denied the company a hearing and entered judgment on the pleadings holding that:

> "employee benefit plans which on their face are restricted to participation or enjoyment by employees who are not members of a union or who have foregone their right to select and bargain through a collective bargaining representative, are inherently restrictive of employee rights and . . . are per se violations of Section 8(a)(1) of the Act." 1969 CCH NLRB ¶21,496, at 27,515 (December 16, 1969).

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[10] *Motor Wheel Corp.*, 180 N.L.R.B. No. 71 (1969); enf. denied (C.A. 6, 1970), 62 LC ¶10,824, 74 LRRM 2832.

The Sixth Circuit's decisions in *Goodyear* and *Motor Wheel* require the Board to consider both the language in question and any relevant rebuttal evidence that a respondent may offer, regarding motivation and effect, before making a finding of an unfair labor practice. Application of this principle to the facts in the case at bar dictates that the Board should have dismissed the complaint.

The Board's Order should be set aside. Section 2(a) is not discriminatory. It permits no more than what the Board has conceded as lawful, *i.e.*, that Petitioner's records are a factor which may be considered by the Trustees in determining past service credits. Furthermore, assuming, *arguendo*, that the language afforded some preference to union members, the Board, without affirmative proof that the Petitioner's motive was unlawful, has failed to sustain its burden of proof.

Respectfully submitted,

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Arthur Liberstein
*Of Counsel*

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 23rd day of August 1974 , at 2 o'clock P. M. he served the annexed REPLY BRIEF FOR PETITIONER AND INTERVENOR in RE: TRUCK DRIVERS LOCAL UNION NO. 807, et al., v. NATIONAL LABOR RELATIONS BOARD

upon NATIONAL LABOR RELATIONS BOARD

Esq(s)., Attorney(s)

for RESPONDENT

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (~~his~~/their) office

WASHINGTON, D.C. 20570, ELLIOTT MOORE, ESQ. DEPUTY ASSOCIATE GENERAL COUNSEL

that being the address designated in the last papers served herein by the said attorney. Joseph Boselli

Sworn to before me this 23rd day of August 1974

Michael H. Solin

MICHAEL H. SOLIN
Notary Public, State of New York
No. 41-3100710
Qualified in Queens County
Commission Expires March 30, 1976